Filed 1/11/19 P. v. Sullivan CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. STEFAN FRANZ SULLIVAN, Defendant and Appellant.	C082183 (Super. Ct. No. 15F02928)

A jury found defendant Stefan Franz Sullivan guilty of assault with a deadly weapon. On appeal, defendant contends the trial court erred in instructing the jury using CALCRIM No. 250, which instructs on the required union of act and intent for general intent crimes. The People concede error but maintain it was harmless. We agree with the People.

Defendant also contends the abstract of judgment must be corrected to reflect that his conviction for assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1))[1] is not

[1] Undesignated statutory references are to the Penal Code.

an enumerated "violent felony" under section 667.5, subdivision (c). The People agree and so do we. We will order a corrected abstract and otherwise affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant and his sister (the victim) were both living with their mother in Sacramento. Also living there was the victim's husband, daughter, and son. On the day of the incident, the mother's good friend was visiting.

The Victim Testifies

The victim testified that the day of the incident, she received a call from her 13-year-old son stating that he had an incident with defendant. The victim went home to get her son.

In the house, the victim saw her son in the living room and told him to get his shoes. She then walked into the dining room. At the dining room table, defendant, the mother, and the mother's friend were seated.

The victim slammed her hands on the table and to defendant yelled: "If you have something to say to me, you say it to my face, not to my boy. I'd never do that to your son." Defendant yelled back, and a screaming match erupted.

When the victim started to leave the room, defendant bumped his thigh into her and grabbed her. They cursed and started striking each other. While defendant was punching the victim in the head, he said, "The next time I put a rifle in your chest and pull the trigger, you'll be dead." He also called her a "[f]at fucking bitch."

Defendant wrapped his hand in the victim's hair and pulled her head to his chest. She hit him, trying to get away. She saw a shadow of his arm reach to the table.[2] She

---

[2] The victim has keratoconus and sees multiple images; she cannot make out facial features unless she is very close.

then felt something move down the side of her head across her ear into her cheek. When she felt it hit her throat and blood ran down her chest, she screamed, "He cut my throat, he cut my throat, call 911."[3] The mother broke them apart.

The knife cut through the victim's hair, ear, and face. She received 13 external stitches and several internal ones. An officer who interviewed the victim in the emergency room testified the victim had (in addition to the stitches) quarter-sized lumps on her head, which were consistent with being punched in the head.

The Mother's Friend Testifies

At trial, the mother's friend testified for the defense. She testified she was sitting at the dining table while defendant was in the kitchen cutting bread for sandwiches (a counter separates the kitchen from the dining table).

She recalled a "short discussion" regarding the victim's son, "[a]nd all of a sudden—I can't really tell you much because I wasn't there, but I heard it. And then the next thing that I saw was the boy's mother [the victim] . . . came in very furiously, you know, rushing towards [defendant], and he was cutting the bread, and he said, 'Get away from me, get away,' and that's how the knife comes into the thing, you know." She continued, "all I remember is that he put up his hands, and one had the knife in it, and the other one—the other hand was free. And he said, 'Get away from me.' " She added, "[t]here was no stabbing or anything, he just told her to 'Get away from me.' "

The mother's friend later clarified, "I saw no cutting. I'm sorry. I saw what was in his hands. That's all I remember." She denied seeing defendant push the victim and denied seeing any blood—though she recalled the victim punched defendant while she was screaming.

---

[3] A black-handled kitchen knife with an eight-inch blade was found at the scene.

She described the incident as an "accident": "Because temperaments [*sic*] flared, and it was kind of—I don't know, it was so fast, shuffling, you know. I mean, I wasn't standing there dissecting the whole thing. It happened very fast."

In rebuttal, the prosecution offered evidence of the mother's friend's interview with an officer after the incident. The friend had told the officer that while the victim and defendant were yelling and screaming, defendant put both his hands at the base of the victim's neck and shook—holding the knife as he did so. The friend told the officer the cut was an accident.

When asked how it happened, the mother's friend said she was not sure if she actually saw the cut or not because she might have been backing out of the kitchen because of the argument.

Jury Verdict and Sentencing

The jury found defendant guilty of assault with a deadly weapon (§ 245, subd. (a)(1)), and the trial court imposed a two-year low term.

DISCUSSION

1.0 Instructional Error

On appeal, defendant first contends the trial court erred in instructing the jury with CALCRIM No. 250. We conclude the error was harmless.

1.1 *Background*

The jury was instructed with CALCRIM No. 250, in pertinent part: "The crime charged in this case requires proof of the union or joint operation of act and wrongful intent. . . . [The] person must not only commit the prohibited act, but must do so with wrongful intent. [¶] A person acts with wrongful intent when he intentionally does a prohibited act; however, it is not required that he intend to break the law. The act required is explained in the instruction for that crime."

As to assault, the jury was instructed with CALCRIM No. 875, in relevant part: "[T]he People must prove that: [¶] One, the defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person; [¶] Two, the defendant did that act willfully; [and] [¶] Three, when the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone. [¶] . . . [¶] Someone commits an act willfully when he does it willingly or on purpose. It is not required that he intend to break the law, hurt someone else, or gain any advantage."

1.2 *Analysis*

Defendant argues the trial court erred in instructing the jury with CALCRIM No. 250. He points out that the bench notes for CALCRIM No. 250 advise, "this instruction *must not* be used if the crime requires a specific mental state, *such as knowledge* or malice, even if the crime is classified as a general intent offense. In such cases, the court must give CALCRIM No. 251 . . . ." CALCRIM No. 251 instructs that the "person must not only intentionally commit the prohibited act, but must do so with a specific mental state. The act and the specific mental state required are explained in the instruction for that crime."

The People agree the trial court should have instructed with CALCRIM No. 251, but maintain the error was harmless. We agree with the People.

The parties are correct that the jury should have received CALCRIM No. 251 rather than CALCRIM No. 250. Assault is a general intent crime, and though it does not require specific intent to injure, it requires a specific mental state: awareness "of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct." (*People v. Williams* (2001) 26 Cal.4th 779, 788.)

Nevertheless, the failure to instruct with CALCRIM No. 251 was harmless as it is not reasonably probable it affected the outcome. (See *People v. Alvarez* (1996) 14 Cal.4th 155, 220 [failure to instruct on the union of act and specific intent is prejudicial if there is a reasonable probability of an effect on the outcome].)[4]

Here, the jury was instructed on the precise mental state required for assault with a deadly weapon (CALCRIM No. 875): "[W]hen the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone." CALCRIM No. 250 did not conflict with that instruction.[5] While CALCRIM No. 251 reminds the jury that a specific mental state is required, CALCRIM No. 250 did not suggest to the jury that the mental state requirement could be ignored. Thus, given the instructions as a whole, the jury was aware of the requirements for assault, and a more favorable result was not reasonably probable had the jury been instructed with CALCRIM No. 251.

Defendant, nevertheless, argues he had relied on defenses of self-defense and accident and notes the jury was instructed on accident (CALCRIM No. 3404): "[A] defendant is not guilty of assault if he acted without the intent required for that crime, but acted instead accidentally." He concludes the jury would believe it was not an accident,

---

[4] Defendant maintains *Chapman v. California* (1967) 386 U.S. 18 [17 L.Ed.2d 705] is the proper standard for prejudice and cites *People v. ZarateCastillo* (2016) 244 Cal.App.4th 1161 in support. *ZarateCastillo*, however, did not consider the proper standard; it merely concluded the instructional error was harmless beyond a reasonable doubt. (See *ZarateCastillo*, at p. 1168.) Defendant also cites *People v. Saavedra* (2018) 24 Cal.App.5th 605, 615, which does not take a position but maintains a conflict exists as to the proper standard. The authorities cited in *Saavedra*, however, do not convince us a standard other than the one announced in *Alvarez* is the correct one.

[5] Indeed, CALCRIM No. 875 mirrors CALCRIM No. 250 insofar as it states: "Someone commits an act willfully when he does it willingly or on purpose. It is not required that he intend to break the law, hurt someone else, or gain any advantage."

even if he was heedless of the knife he was holding, so long as he intentionally performed the prohibited act. He adds that the prosecutor's closing argument reinforced the error by arguing that even under the mother's friend's account, as told to the officer, defendant still committed assault: "That knife didn't fall from the heavens into his hand. Whether or not he knew it was in his hand or realized it was in his hand and how fast things went, he still had it in his hand. He willfully grabbed the woman, he deliberately grabbed the woman, and as a result he willfully cut the woman." We disagree.

CALCRIM No. 250 did not undermine defendant's defense of accident. Again, nothing in CALCRIM No. 250 conflicted with the assault instruction, and the jury was fully instructed on the mental state required for assault. To the extent the prosecutor's closing argument conflicted with the court's instruction on assault, we presume the jury heeded the instruction to follow the court's explanation of the law rather than conflicting attorney comments.[6] (See *People v. Boyette* (2002) 29 Cal.4th 381, 436 [the court presumes the jury followed the instruction that when the description of the law given by the attorneys conflicts with the law given by the trial court, the jury is to follow the court's instruction].)

Accordingly, instructing with CALCRIM No. 250 was harmless.

2.0 Correction to the Abstract of Judgment

Defendant next contends the abstract of judgment should be corrected to fix an erroneously checked box indicating he had been convicted of a violent felony. The People concede error, and we agree.

---

[6] The jury was instructed (CALCRIM No. 200): "You must follow the law as I explain it to you . . . . If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."

Defendant was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)), which is not an enumerated "violent felony" under section 667.5, subdivision (c), and personal infliction of great bodily injury was not alleged. (See *People v. Ruiz* (1999) 69 Cal.App.4th 1085, 1089.) Yet, at item 1 of the abstract of judgment, the box for "VIOLENT FELONY" (to the right of the assault conviction—count one) is checked. We will order the abstract corrected.

DISPOSITION

The trial court is directed to prepare a corrected abstract of judgment reflecting that defendant's conviction for assault with a deadly weapon is not a violent felony. The trial court is further directed to forward a certified copy to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

BUTZ, Acting P. J.

We concur:

MAURO, J.

DUARTE, J.